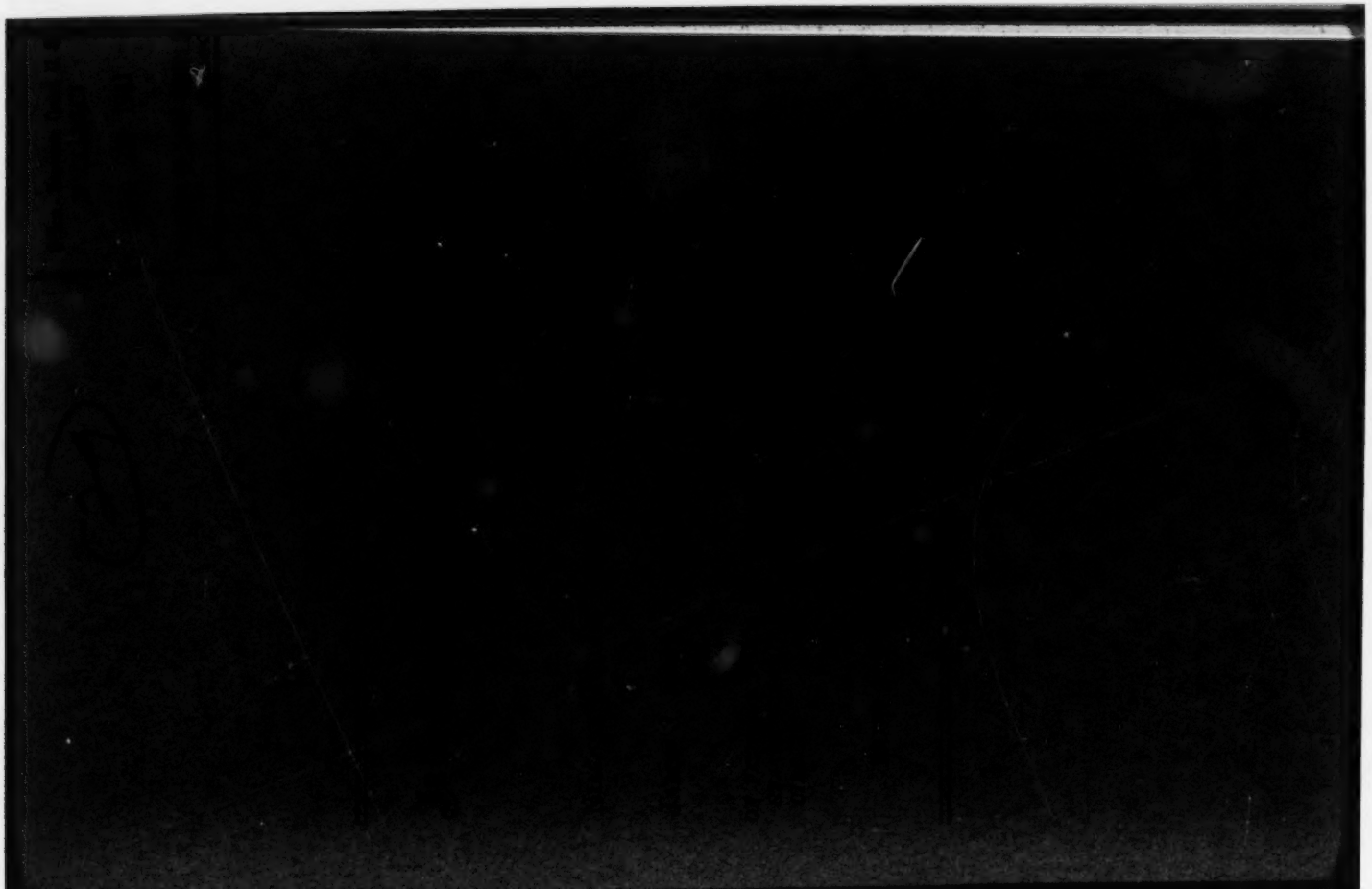

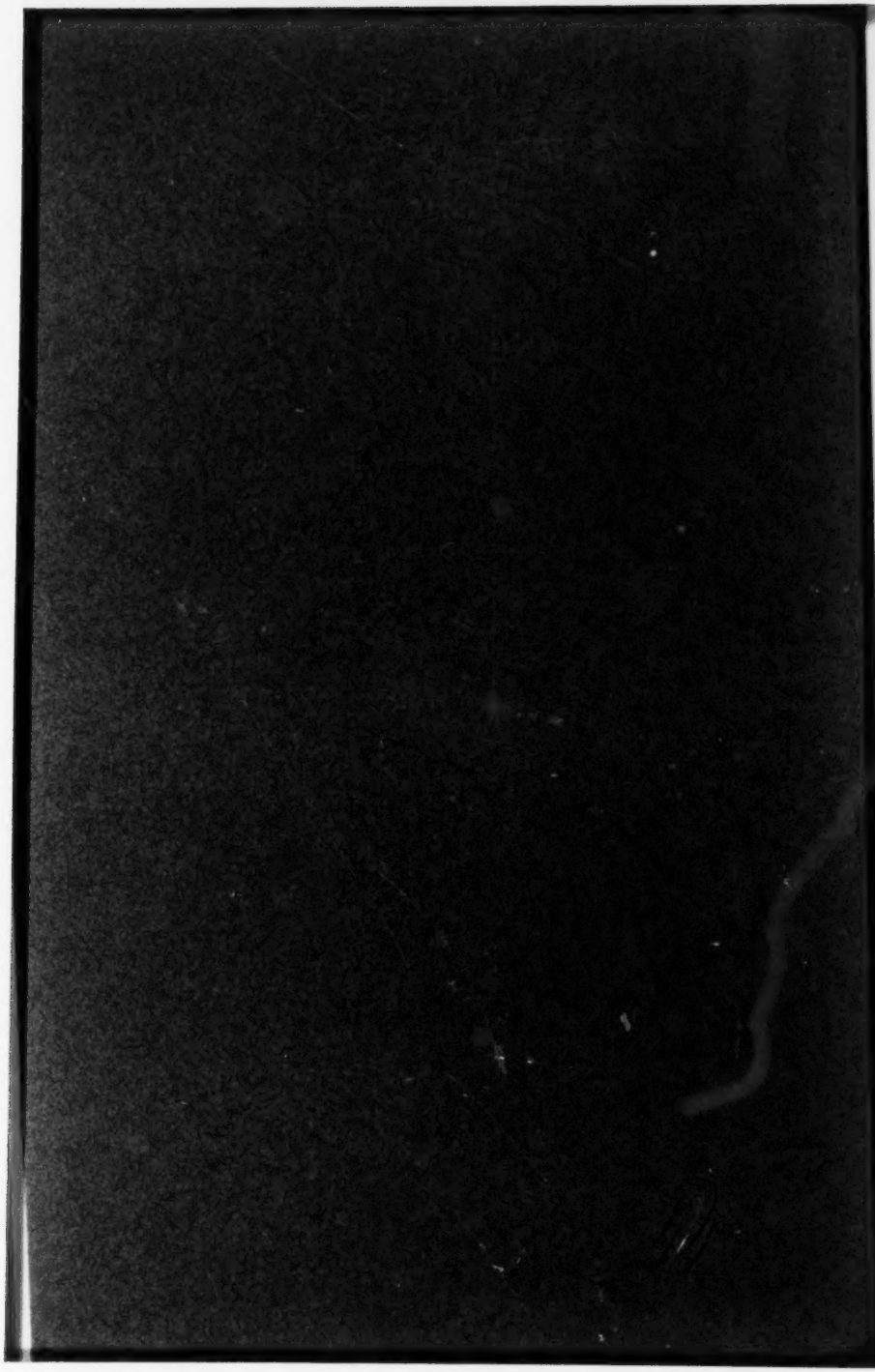

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311357—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 871

NIAGARA HUDSON POWER CORPORATION, PETITIONER

v.

JAMES J. HOEY, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 83–87) is reported in 34 F. Supp. 302. The opinion of the Circuit Court of Appeals (R. 94–96) is reported in 117 F. (2d) 414.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 19, 1941 (R. 97). The petition for writ of certiorari was filed March 26, 1941. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a corporation resulting from a consolidation of two existing corporations under Section 86 of the New York Stock Corporation Law is liable for the federal documentary stamp tax levied by Section 800, Schedule A–3, of Title VIII of the Revenue Act of 1926, as amended, upon the acquisition of the stocks owned by the constituent companies.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, * * * the several taxes specified in such schedule. * * *.
>
> SCHEDULE A.—STAMP TAXES
>
> * * * * *
>
> 3. (As amended by Section 723 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and the Act of June 29, 1936, c. 865, 49 Stat. 2029.) On all sales, or agreements to sell, or memoranda of sales or deliveries of, or

transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued) 4 cents until July 1, 1937, and 2 cents thereafter, and where such shares or certificates are without par or face value, the tax shall be 4 cents until July 1, 1937, and 2 cents thereafter, on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share as the case may be). * * *.

Treasury Regulations 71 (1932 ed.):

ART. 34. *Sales or transfers subject to tax.*—The following are examples of transactions subject to the tax:

* * * * *

(r) Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corpora-

tion, such a transfer being effected by the act of the parties and not wholly by operation of law.

* * * * *

ART. 35. *Sales or transfers not subject to tax.*—The following are examples of transactions not subject to the tax:

* * * * *

(r) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

* * * * *

STATEMENT

The facts, which were stipulated (R. 17–81), may be summarized as follows:

The petitioner was formed on February 1, 1937, pursuant to Section 86 of the Stock Corporation Law of New York, by the consolidation of two corporations, Mohawk Hudson Power Corporation, and another which bore the same name as petitioner, and is therefore referred to herein as "Niagara Hudson Power Corporation (constituent)" (R. 18).

The consolidation was effected by the following procedure: A proposal to consolidate the constituent corporations, in accordance with a plan which had already been formulated, was made at a meet-

ing of the board of directors of Niagara Hudson Power Corporation (constituent) held on December 18, 1936. A certificate of consolidation containing all of the terms, conditions and provisions of the proposed consolidation was presented to the meeting, and the board of directors approved the plan and recommended it to the stockholders of the corporation. The board also directed the secretary to call a special meeting of the stockholders on January 29, 1937, to take action on the plan, and directed the officers to give notice to the stockholders of the meeting, and to secure the approval of the Public Service Commission of New York State for the consummation of the consolidation (R. 20–21, 34–45).

Similar action was taken at a meeting of the board of directors of Mohawk Hudson Power Corporation held on the same date (R. 22–23, 57–68).

Pursuant to the action taken at the meeting of its board of directors, Niagara Hudson Power Corporation (constituent) sent to its stockholders a circular letter dated December 22, 1936, advising them of the proposed consolidation and the terms thereof, together with a notice of the stockholders' meeting to be held on January 29, 1937 (R. 21).

A similar circular letter dated December 22, 1936, was sent by Mohawk Hudson Power Corporation to its stockholders, together with a notice of a stockholders' meeting to be held on January 29, 1937 (R. 24).

The stockholders' meeting of Niagara Hudson Power Corporation (constituent) was held on January 29, 1937, but no action was taken until the convening of the adjourned meeting on January 30, 1937. At this meeting the proposed plan of consolidation was considered, and was approved by the holders of more than two-thirds of the voting stock of the corporation. Further action was taken authorizing the officers of the corporation to perform the acts necessary and proper to carry the consolidation into effect, including the execution and filing of the certificate of consolidation in the Department of State of New York (R. 21–22, 48–56).

Similar meetings of the stockholders of Mohawk Hudson Power Corporation were held on January 29 and January 30, 1937, at which similar action was taken (R. 24–25, 71–80).

Pursuant to the authority granted at the stockholders' meetings of the two constituent corporations, the certificate of consolidation, duly executed by the corporate officers and accompanied by their appropriate affidavits, was filed with the Secretary of State of New York on February 1, 1937 (R. 26).

At the first meeting of the board of directors of petitioner on February 1, 1937, the directors authorized the issuance of certificates for the petitioner's capital stock in exchange for certificates of the capital stock of the constituent corporations, and appointed agents to receive the old certificates

for cancellation and to issue new certificates representing capital stock in petitioner in exchange therefor (R. 26–27).

Niagara Hudson Power Corporation (constituent) had kept certificates representing stocks in other corporations which it owned prior to the consolidation in a safe deposit box. After the consolidation, and at the first meeting of petitioner's board of directors on February 1, 1937, certain of its officers were authorized to have access to the safe deposit box containing the securities mentioned (R. 26–27). The certificates for stocks in other corporations held by Mohawk Hudson Power Corporation prior to the consolidation were shipped on February 3, 1937, to petitioner and were deposited by it in the same safe deposit box (R. 28–29).

Through the consolidation petitioner acquired title to all of the assets, including a large amount of capital stocks referred to above (R. 32–33), held by the constituent corporations. Upon the transfer to petitioner of these stocks, the Commissioner of Internal Revenue assessed a tax under Schedule A–3, Title VIII of the Revenue Act of 1926, as amended, *supra,* in the sum of $260,960.04 (R. 29). Petitioner paid this tax, filed a claim for refund which was rejected, and then commenced this suit (R. 29–30). The District Court sustained the Commissioner (R. 87–88) and the court below affirmed (R. 97).

ARGUMENT

1. The court below correctly held that the transfer of the stocks owned by the constituent corporations to the petitioner was subject to the stamp tax imposed by Section 800, Schedule A–3, Title VIII of the Revenue Act of 1926, as amended, *supra*. The broad scope of this statute was recognized in *Provost* v. *United States*, 269 U. S. 443, 458, where this Court pointed out that it evidenced a purpose to tax all transfers of legal title to shares whether technical sales or not. This view was reiterated in *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60, 62–63:

> The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax every transaction whereby the right to be or become a shareholder of a corporation or to receive any certificate of any interest in its property is surrendered by one and vested in another. * * * The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements.

And in *Founders General Co.* v. *Hoey*, 300 U. S. 268, 275, this Court observed that "The statute defines the scope of the tax in terms whose breadth is emphasized by the careful particularity of its provisos."

Treasury Regulations 71 (1932 ed.), *supra*, relating to the stamp tax, definitely support rather than contradict the Government's position here. Article 35 (r), *supra*, upon which the petitioner relies, classifies as exempt those transfers of shares

which result wholly by operation of law without any voluntary act of the parties, such as from decedent to executor. However, among the examples of transactions subject to the tax set forth in the preceding Article 34 (r), *supra,* is found the transfer of stock owned by a corporation which is merged into another corporation, such a transfer being considered as resulting from the act of the parties and not wholly by operation of law.

The contention that the transfer of legal title here was a transfer wholly by operation of law (Pet. 5–6) is refuted by all of the acts preliminary to the filing of the certificate of consolidation, including those of the boards of directors, officers and stockholders, which are summarized in the statement of facts, *supra.* In this respect, a "consolidation" cannot be distinguished from a "merger," as petitioner suggests; in both cases there is a definite change in the stockholders' interest in a business, and in both that change occurs because the stockholders, directors, and officers will it. The decision below is thus in full accord with *Koppers Coal & Transportation Co.* v. *United States,* 107 F. (2d) 706 (C. C. A. 3d), in which the stamp tax was held applicable to a transfer of stocks resulting from a Delaware merger.

2. Petitioner asserts a conflict with *United States* v. *Merchants' National Trust & Savings Bank,* 101 F. (2d) 399 (C. C. A. 9th). In that case the trust department of one bank was sold to another bank pursuant to Section 31 of the California Bank Act,

and the question was whether the resultant transfer of title to the securities held in the trust accounts was subject to the stamp tax. The court held that the transfer was not subject to the tax, in part because the transferee bank was deemed to have succeeded to the securities solely by operation of California law. Irrespective of the correctness of that decision, the facts upon which it was based are obviously very different from those here involved. The conflict between the decisions, if any, relates solely to the effect to be given to state law in applying the Regulations; the Circuit Court of Appeals for the Ninth Circuit believed that the question of whether a transfer is "by operation of law" within the meaning of the Regulations depends solely upon local law, while the court below, although deeming state court decisions to be "of persuasive value," held that they "cannot be determinative as to what is a transfer under federal law" (R. 96). That this apparent difference in view may be a result of a difference in statement rather than of a difference in opinion is indicated by the earlier decision of the Circuit Court of Appeals for the Ninth Circuit in *Welch* v. *Kerckhoff*, 84 F. (2d) 295, in which the court squarely held that the operation of the federal stamp tax statute is not dependent on state law. But even if the cases may be considered as being in conflict on this point, the conflict may be taken to have been resolved by the decision of this Court in *Morgan* v. *Commissioner*, 309 U. S. 78. That decision, although concerned with the estate tax rather than

the stamp tax, plainly discredits the principle enunciated in the *Merchants' National Bank* case.

Furthermore, since the question at issue relates to the operation of the Regulations, rather than to the meaning of a specific statutory provision, any necessary clarification can readily be secured through administrative action.

3. There is no conflict with *Helvering* v. *Metropolitan Edison Co.*, 306 U. S. 522. The question there was whether there had been a merger, a question necessarily to be determined under local law. The question here, on the other hand, is whether the type of transfer accomplished by a statutory consolidation under the law of New York is the type of transfer which Congress has subjected to tax. On that issue, federal law is plainly decisive, classification of the transaction under local law being immaterial. *Morgan* v. *Commissioner, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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